

E-filed: 10/15/09

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ANTHONY SARKIS,
Plaintiff,

v.

MIROSLAV LAJCAK; OFFICE OF THE
HIGH REPRESENTATIVE,
Defendants.

No. C-08-01911 RMW

ORDER GRANTING MOTION TO DISMISS

[Re Docket No. 21]

Plaintiff Anthony Sarkis has filed suit against the Office of the High Representative for Bosnia and Herzegovina (the "OHR") and Ambassador Miroslav Lajcák, in his official capacity as the High Representative, for wrongful termination. The complaint asserts twenty claims arising out of the termination of Sarkis' employment. Defendants have moved to dismiss the complaint for lack of subject matter jurisdiction under Rule 12(b)(1) on the basis of claimed sovereign immunity under the Foreign Sovereign Immunities Act, 28 U.S.C. §1330(a), for lack of personal jurisdiction under Rule 12(b)(2), and for insufficient service of process under Rule 12(b)(5). Sarkis opposes the motion. The court has reviewed the papers and considered the arguments of counsel. For the following reasons, the court grants the motion to dismiss for lack of personal jurisdiction and,

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1 because this issue is dispositive, the court does not reach the remaining asserted grounds.

2 I. BACKGROUND

3 A. The Office of the High Representative

4 The Office of the High Representative for Bosnia and Herzegovina was created under the
5 1995 Dayton Peace Accords, formally referred to as the General Framework Agreement for Peace
6 ("GFAP") to oversee the implementation of the civilian aspects of the Peace Agreement on behalf of
7 the international community. It is the chief civilian peace implementation agency in Bosnia and
8 Herzegovina. It is a separate legal entity from the parties to the GFAP, and it consists of diplomats
9 seconded by the governments of the Peace Implementation Council countries, international experts
10 and national staff from Bosnia. The High Representative is "the final authority in theater regarding
11 interpretation of [GFAP, Annex 10] on the civilian implementation of the peace settlement."
12 Cymrot Decl. Ex. D. The OHR and its High Representative work "with the people and institutions
13 of Bosnia and Herzegovina and the international community to ensure that Bosnia and Herzegovina
14 evolves into a peaceful and viable democracy on course for integration into Euro-Atlantic
15 institutions." Sarkis Decl. Ex. B. *Id.* The OHR is headquartered in Sarajevo, Bosnia and
16 Herzegovina. Complaint ¶9.

17 B. The OHR's Contacts with Sarkis and California

18 The OHR advertised an open position for a "Legal Counsel" in *The Economist*, a global
19 weekly news magazine. Compl. ¶ 12. Anthony Sarkis read the advertisement in California. *Id.* He
20 applied for the position from California, and conveyed this to the OHR by displaying California
21 contact information in his cover letter and on his resume. *Id.* ¶ 14.

22 The OHR responded in February 2003 by emailing Sarkis and proposing to interview him
23 over the phone. *Id.* ¶ 15. The parties conducted the interview on February 25, 2003, with Ian
24 Campbell (then-Deputy High Representative and head of the OHR's Legal Department) speaking for
25 the OHR. *Id.* ¶¶ 15-16. Gilbert Bruns, the director's the OHR's Resources Department, and Sunita
26 Samarah, the OHR's principal Personnel Officer, also participated in the interview. *Id.* ¶¶ 18-19.
27 After the interview, Sarkis provided contact information for a person in Los Angeles to serve as a
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1 job reference. *Id.* ¶ 20. The OHR also called the job reference and spoke for a long time. *Id.*

2 Samarah offered the Legal Counsel position to Sarkis by email on March 4, 2003. *Id.* ¶ 21.

3 Sarkis read the offer and responded to Samarah's email voicing concerns about the job's duration.

4 *Id.* ¶ 23. Sarkis and Samarah again spoke over the phone on March 5, 2003, and Samarah allayed

5 Sarkis's worries. *Id.* ¶¶ 23-25. Sarkis promptly signed the OHR's employment contract in California

6 and faxed it to the OHR. *Id.* ¶¶ 26-27.

7 Over the following month, Sarkis coordinated his travel plans with the OHR and the OHR

8 purchased Sarkis' airfare to Bosnia. *Id.* ¶ 28. Sarkis also engaged in two email exchanges with the

9 OHR regarding various terms of the employment agreement related to the job's duration. *See id.* ¶¶

10 29-37. One such exchange was with Ian Doig, the head of the OHR's Personnel Department. *Id.* ¶

11 33. Doig declares that at the time of the emails, he was aware that Sarkis resided in California.

12 Decl. of Ian Doig, Docket No. 31-2 ¶ 3. Indeed, one of Doig's reasons for wanting to hire Sarkis

13 was to get "one of those sophisticated West Coast lawyers," and he shared his desire with other

14 members of the OHR. *Id.* From 2003 through 2007, Sarkis and the OHR entered into written

15 annual employment contracts. Compl. ¶¶ 39-45. Plaintiff alleges that the employment arrangement

16 could only be terminated for cause.

17 **C. Sarkis's Work for the OHR and Eventual Termination**

18 Sarkis began working for the OHR as a legal counsel, but was promoted to the position of

19 "General Counsel" in mid-2005. Compl. ¶ 56. From 2003 through 2007, Sarkis and the OHR

20 entered into written annual employment contracts. Compl. ¶¶ 39-45. Sarkis handled a number of

21 sensitive tasks and led negotiations with multiple foreign governments on the OHR's behalf. *See id.*

22 ¶¶ 54, 57-58. Sarkis never received a critical or negative annual performance evaluation. *Id.* ¶ 60.

23 Nevertheless, on April 13, 2007, the OHR terminated Sarkis' employment. *Id.* ¶ 53. The

24 OHR did not state a reason for doing so. *Id.* It also expelled Sarkis from the OHR's premises and

25 banned him from returning. *Id.* Sarkis believes he was fired in retaliation for providing frank legal

26 advice. *See id.* His lawsuit claims that the OHR breached its agreements with him, committed

27 promissory fraud in its employment negotiations with him, inflicted emotional distress on him and

libeled him in connection with his firing and expulsion.

D. Defendant Lajcák's Involvement

Defendant Lajcák was not personally involved in any of the underlying events and has been named solely in his official capacity as the High Representative. He succeeded to the position of High Representative after the events underlying plaintiff's termination. He has no material contacts with California.

II. ANALYSIS

Defendants move to dismiss under Rule 12(b)(2) for lack of personal jurisdiction. The parties dispute whether the defendants have sufficient minimum contacts with California such that the exercise of personal jurisdiction over the defendants would be reasonable. According to Sarkis, the OHR availed itself of California when it advertised the Legal Counsel position in *The Economist* which Sarkis read in California, contacted him in California, interviewed him over the telephone when he was in California, paid for his travel from California, and deposited some of his pay in a California account. Based on these acts, Sarkis argues that the OHR has sufficient contacts with California to permit it to be sued in California. Defendants disagree.

Where there is no applicable federal statute governing personal jurisdiction, the court applies the long-arm statute of the forum state. *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 433 F.3d 1199, 1205 (9th Cir. 2006) (en banc). California's long arm statute is coextensive with federal due process requirements so the jurisdictional analysis reduces to whether the exercise of jurisdiction over the nonresident defendants is constitutional. *Id.* Under *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), a court may exercise personal jurisdiction over a nonresident defendant consistent with due process only if the defendant has sufficient minimum contacts with the forum state that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice. The Ninth Circuit analyzes specific jurisdiction according to a three-prong test:

(1) the non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof, or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum thereby invoking the benefits and protections of its laws;

1 (2) the claim arises out of or results from the defendant's forum-related activities, and

2 (3) the exercise of jurisdiction must be reasonable.

3 *Yahoo!*, 433 F.3d at 1205-06, citing *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802
4 (9th Cir. 2004).

5 The mere existence of a contract between Sarkis and the OHR does not determine this issue.
6 See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478-79 (1985). Instead, the court must take a
7 "highly realistic" approach and evaluate the "prior negotiations and contemplated future
8 consequences, along with the terms of the contract and the parties' actual course of dealing" to
9 determine whether the OHR availed itself of California. *Id.* This "qualitative analysis" must
10 determine whether the OHR could have reasonably anticipated being haled into court in California.
11 *Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1130 (9th Cir. 2003).

12 Realistically, the court cannot conclude that the OHR could have anticipated in 2003 when it
13 placed an ad in *The Economist* that it would be sued in California. The OHR did not specifically
14 target California to recruit an attorney, although it was pleased when it found a "sophisticated West
15 Coast lawyer" to join its operations. On the contrary, it advertized in *The Economist*, a magazine
16 with a global circulation. Placing an advertisement in an international publication seeking to hire an
17 employee for a position out of state does not rise to the level of "purposeful availment." *Katerndahl*
18 *v. Brindenberg Securities A/S*, 1996 U.S. Dist. Lexis 22024 (N.D. Cal. 1996); *Johnston v. Frank E.*
19 *Basil*, 803 F.2d 418, 420 (11th Cir. 1986). Similarly, the fact that there were telephone calls and e-
20 mail communications with plaintiff in California in the course of the negotiations leading to the
21 formation of the initial employment contract is not sufficient. *Katerndahl*, at *11; *Peterson v.*
22 *Kennedy*, 771 F.2d 1244, 1262 (9th Cir. 1985); *Markey v. Kudelski S.A.*, 2007 WL 1110787, *5
23 (S.D. Cal. 2007). Notably, after the initial contract was entered, it was performed outside of
24 California, in Bosnia, as were the succeeding annual contracts over the next four years.

25 Sarkis contends that particular actions by the OHR constitute purposefully directing its
26 activities toward California, sufficient to justify the exercise of jurisdiction over it. For example,
27 Sarkis argues that "[t]he situs of OHR's primary performance on all its contracts with Plaintiff was
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1 California" because "on a monthly basis, the OHR transmitted nearly 66% of Plaintiff's monthly
2 compensation package to his California Wells Fargo bank account." Opp. at 26. Sarkis' argument is
3 not persuasive. Sending payments to California when the material and essentially all of the
4 performance of the contract was in Bosnia is not sufficient to justify the exercise of personal
5 jurisdiction in California. *See Holt Oil & Gas Corp. v. Harvey*, 801 F.2d 773, 778 (5th Cir. 1986)
6 (given that the material performance of the contract occurred outside of the forum, the fact that
7 payments were made to plaintiff in the forum did not "weigh heavily" in the jurisdictional
8 determination). Without elaboration, Sarkis cites *Markey* in support of his argument, presumably
9 because the court there noted that the plaintiff had accepted payment from defendant-employer in
10 Tennessee. It is not clear from the discussion in *Markey* whether the defendant was in Tennessee
11 when payment was made or whether plaintiff was in Tennessee when he accepted payment, but in
12 any event, *Markey* does not support plaintiff's position. To the contrary, *Markey* found no personal
13 jurisdiction in a wrongful termination action on facts similar to those presented here – a foreign
14 employer, limited contacts with California, and work performance outside of California.

15 Sarkis also argues that the OHR hired him because he is admitted to the California bar, that
16 this was important to the OHR in its decision to hire him, and that this shows the OHR's availment
17 of the benefits of California. Sarkis Decl. ¶ 30. Sarkis also points out that the OHR stressed his
18 obligations as a member of the California bar in its rejection of his settlement demand. *Id.*, Ex. AA.
19 The court is not persuaded that this Sarkis' membership in the California bar is sufficient to bear any
20 jurisdictional weight. *Markey*, although cited by Sarkis, offers him no support.

21 Sarkis also argues that in tort cases, the court applies an "effects" test, such that the
22 "purposeful availment" prong may be met where a defendant's tortious acts have an effect in the
23 forum. Opp. at 22. A foreign act, aimed at the forum state and having an effect in the forum state,
24 may give rise to personal jurisdiction over the foreign actor. *Calder v. Jones*, 465 U.S. 783 (1984);
25 *Bancroft & Masters Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1087-88 (9th Cir. 2000). The
26 gravamen of Sarkis' claim is that he was induced to enter into an employment arrangement based on
27 representations that the position could be terminated only for cause, and he was subsequently
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1 terminated without cause four years later in Bosnia. Following his termination, Sarkis returned to
2 California. Even assuming, for the sake of analysis, that some effects of the allegedly tortious
3 misrepresentations were in California, Sarkis has not established that such effects were
4 "jurisdictionally sufficient." *Yahoo!*, 433 F.3d at 1207. Sarkis contends that the OHR made
5 misrepresentations to him in California (i.e., that termination would only be for cause), which
6 plaintiff relied on to his detriment by leaving California and relocating overseas foregoing "the
7 opportunity to locate less arbitrary employment in California." Opp. at 23. This same argument was
8 rejected by the Sixth Circuit in *Conti v. Pneumatic Products Corp.*, 977 F.2d 978 (6th Cir. 1992), a
9 wrongful termination case involving similar facts.

10 In *Conti*, an Ohio plaintiff responded to an ad in the Wall Street Journal and submitted his
11 resume to a recruiting firm in Florida. Thereafter, a company in Florida enlisted the recruiting firm
12 to fill a position in Florida, the recruiter contacted plaintiff and negotiations commenced.
13 Ultimately, plaintiff accepted the resulting offer of employment, relocated to Florida where he
14 performed the job, and was thereafter terminated. Plaintiff sued in Ohio, alleging that
15 representations made to him in the course of the negotiations were fraudulent and that he had relied
16 to his detriment in accepting the offer and relocating. The district court found that there was no
17 personal jurisdiction over the Florida defendant, and the Sixth Circuit affirmed, both on the
18 purposeful availment prong and on the basis that exercising jurisdiction over the out-of-state
19 defendant in these facts would not be reasonable. *Conti*, 977 F.2d at 983. The present case is not
20 materially different. Moreover, similar wrongful termination cases are in accord. *See Houseman v.*
21 *DPI Food Prods. Inc.*, 2005 WL 2656123 (E.D. Ky.) (no personal jurisdiction over out-of-state
22 employer who recruited plaintiff to work out-of-state); *Condon v. Flying Puck, LLC*, 35 Fed. Appx.
23 173, 174 (6th Cir. 2002) (same).

24 Turning to the second prong of the analysis, most of Sarkis' claims do not arise out of or
25 result from the California contacts. Sarkis' claims arise out of the termination of his employment,
26 outside of California, in 2007 some four years after his employment commenced. The termination
27 does not "arise out of" or result from the defendants' forum-related activities, specifically the pre-

1 employment discussions and negotiations at the outset of the parties' relationship.

2 Finally, the court finds that the exercise of personal jurisdiction over the defendants in this
3 case would not be reasonable. In considering whether the exercise of personal jurisdiction would be
4 reasonable, the court considers the following seven factors:

- 5 1) the extent of the defendant's purposeful interjection into the forum state's affairs;
- 6 2) the burden on the defendant in defending in the forum;
- 7 3) the extent of conflict with the sovereignty of the defendant's state;
- 8 4) the forum state's interest in adjudicating the dispute;
- 9 5) the most efficient judicial resolution of the controversy;
- 10 6) the importance of the forum to the plaintiff's interest in convenient and effective relief;
- 11 and
- 12 7) the existence of an alternate forum.

13 *Menken v. Emm*, 503 F.3d 1050, 1058 (9th Cir. 2007), *citing CE Distrib. LLC v. New Sensor Corp.*,
14 380 F.3d 1107, 1112 (9th Cir. 2004). These factors generally weigh in favor of the defendants.

15 First, there was little purposeful injection into the forum state's affairs and none by defendant
16 Lajcák.

17 Second, defendants would face some burden in defending a lawsuit in a foreign country.
18 *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114 (1987); *Core-Vent Corp. v. Nobel*
19 *Indus. AB*, 11 F.3d 1482, 1488 (9th Cir. 1993). Although modern technology has reduced the
20 burden of litigating in a distant forum to some degree, this factor weighs in defendants' favor.

21 The third factor regarding the extent of conflict with the sovereignty of the defendant's state
22 is difficult to assess. Defendants contend that the exercise of jurisdiction would "conflict with
23 OHR's mission;" Sarkis contends that Bosnia and Herzegovina "has declared its disinterest in this
24 matter." Opposition at 29 n.54. The court weighs this factor in favor of defendants, but not
25 dispositively so.

26 Fourth, California's interest in adjudicating the dispute is modest, but weighs slightly in
27 plaintiff's favor. Although this action involves a California plaintiff and California generally has an
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1 interest in protecting the interests of its residents, that interest is lessened to some degree where
2 plaintiff resided outside of California at the time of the materially significant acts giving rise to the
3 action. Sarkis contends that California has a substantial interest in the action because California law
4 and public policy have been violated, yet cites no authority that California's public policy relating to
5 employment relationships applies to employment contracts with non-California employers that are
6 performed (and allegedly breached) outside of the state.

7 Fifth, the efficient resolution of the controversy factor focuses on where the witnesses and
8 evidence are likely to be located. *Menken*, 503 F.3d at 1060-61. With the exception of Sarkis
9 himself, it appears that no witnesses or evidence are in California. Plaintiff has identified four US
10 resident witnesses, three UK resident witnesses and one witness who is a resident of Moldova
11 (Sarkis Decl. ¶37); defendants contend that the relevant witnesses and evidence are in Bosnia.
12 Reply at 19. This factor does not weigh in Sarkis' favor.

13 With regard to the sixth factor – the importance of the forum to plaintiff's interest in
14 convenient and effective relief – Sarkis focuses solely on his own convenience. Opp. at 29 n.54.
15 This factor does not focus on plaintiff's convenience, however, and plaintiff's convenience is given
16 little weight. *Menken*, 503 F.3d at 1061; *Core-Vent*, 11 F.3d at 1490.

17 Seventh, with regard to the availability of an alternate forum, defendants suggest that an
18 alternate forum exists, specifically the internal dispute resolution procedures incorporated into the
19 employment contract. Complaint Ex. D at ¶3.2 (contract), incorporating Policies and Procedures
20 (Ex. E) including §40 (internal grievance procedure). Sarkis simply asserts that there is no
21 alternative forum. Opp. at 29, n. 54. Sarkis has not carried his burden of establishing that there is
22 no alternate forum available. *Menken*, 503 F.3d at 1061. Thus, this factor weighs in defendants'
23 favor.

24 Taking into account all seven reasonableness factors, the court finds that they predominantly
25 weigh in favor of defendants such that the exercise of jurisdiction over the defendants in this case
26 would not be reasonable.

27 Accordingly, the court finds that there is no personal jurisdiction over the defendants and
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1 grants the defendants' motion to dismiss for lack of personal jurisdiction.

2 Defendants motion also seeks dismissal for lack of subject matter jurisdiction, contending
3 that they are entitled to sovereign immunity under the Foreign Sovereign Immunities Act, 28 U.S.C.
4 1330(a), and for insufficient service of process under the Act. Whether the FSIA applies to an entity
5 such as the OHR, or to the High Representative, presents novel and thorny issues. It is not necessary
6 for the court to reach these issues, however, because the lack of personal jurisdiction disposes of this
7 case. The court thus exercises its discretion to not reach the alternate grounds asserted in
8 defendants' motion.

9 III. ORDER

10 For the foregoing reasons, the court grants defendants' motion to dismiss under Rule 12(b)(2)
11 for lack of personal jurisdiction.

12
13 DATED: 10/14/09



RONALD M. WHYTE
United States District Judge

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9 Counsel are responsible for distributing copies of this document to co-counsel that have not registered for e-filing under the court's CM/ECF program in each action.

10 **Dated:** 10/15/09

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Chambers of Judge Whyte